IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RANDY STEVENS, individually and on behalf of all others similarly situated, Plaintiff, v. AT&T INC., and SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	)	Case No. 1:11-cv-00313-MAC

DEFENDANTS' MOTION TO DISMISS OR STAY PLAINTIFF'S CLAIMS PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION

Defendants AT&T Inc. and Southwestern Bell Telephone Company hereby move to dismiss or stay Plaintiff's claims in their entirety on the ground that the matter should be referred to the Federal Communications Commission ("FCC") under the doctrine of primary jurisdiction. Defendants have separately moved to compel arbitration of Plaintiff's claims to the extent they involve services provided to Plaintiff pursuant to contracts that require arbitration of the parties' disputes. The instant motion is made in the alternative, to the extent that any portion of Plaintiff's claims is not subject to mandatory arbitration.

Introduction

Plaintiff Randy Stevens alleges, on behalf of himself and a purported class of persons similarly situated, that Defendants "unilaterally" switched Stevens to electronic, paperless billing, that Defendants failed thereafter to send monthly bills to Stevens for his telephone service, and that Defendants subsequently demanded, and Stevens paid, late payment charges. *See* Complaint ¶¶ 2-3. Stevens seeks a refund of these late payment charges, which he alleges are "unjust and unreasonable." Complaint ¶ 5. In Count 1, Stevens contends that Defendants

have violated the prohibition of 47 U.S.C. § 201(b) against "unjust or unreasonable" charges or practices by telecommunications carriers. Complaint ¶¶ 39-47. In Count 2, Stevens alleges that Defendants have been unjustly enriched by assessing and collecting late payment charges from Stevens. Complaint ¶¶ 48-49.

Pursuant to the doctrine of primary jurisdiction, the Court should dismiss or stay both of Stevens' claims.[1] As demonstrated below, a claim that a carrier has engaged in an "unjust or unreasonable" practice or demanded "unjust or unreasonable" charges in violation of 47 U.S.C. § 201(b) is a classic case for the invocation of primary jurisdiction. "[T]he generality of these terms . . . opens a rather large area for the free play of agency discretion" (*Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)), and the FCC, not the courts, should in the first instance assess the "reasonableness" of a carrier's challenged electronic billing practices, in light of the FCC's expertise and its interest in uniform and consistent regulation under section 201(b). Thus, the Court should dismiss or stay Stevens' section 201(b) claim, pending referral of that claim to the FCC.

For the same reason, the Court should stay Stevens' unjust enrichment claim. At the core of that claim is the same issue that should be addressed by the FCC in the first instance, namely, whether Defendants' alleged charges or practices are somehow unjust or unreasonable such that the late payment charges should be refunded. "[T]here is no doubt that a determination of the reasonableness . . . of common carrier rules and charges is squarely at the heart of the FCC's mandate" (*American Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 244 (D. Mass.

[1] In urging this motion, Defendants do not waive any of their other defenses, including but not limited to: (1) that AT&T Inc. is not a proper party because it is a holding company that provided no goods or services to Plaintiff of any kind, nor did it bill or collect from Plaintiff any of the challenged charges, and (2) Southwestern Bell Telephone Company is not a proper party to the extent Plaintiff's claims relate to services provided by other subsidiaries of AT&T Inc.

1995)), and in accordance with that mandate any judicial assessment of whether Defendants have been unjustly enriched should await the FCC's determination as to whether the challenged charges or practices were unjust or unreasonable.

Argument

Stevens alleges that "[t]he late payment charges assessed and collected by Defendants from Plaintiff . . . constitute unfair, unjust, unconscionable and deceptive billing acts and practices in violation of 47 U.S.C. § 201(b)." Complaint ¶ 46. Section 201(b) of the Communications Act in turn states that "[a]ll charges, practices, classifications, and regulations for and in connection with such [wire or radio] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ." 47 U.S.C. § 201(b). Whether Defendants' alleged billing acts and practices associated with converting customers to paperless billing are "just and reasonable" is a matter that falls squarely within the expertise of the FCC. Accordingly, the Court should apply the doctrine of primary jurisdiction and dismiss or stay Stevens' claims pending referral to the FCC.

The doctrine of primary jurisdiction is intended to "reconcil[e] the functions of administrative agencies with the judicial function of the courts," by allowing "the agency [to] pass in the first instance on those issues that are within its competence." *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 417 (5th Cir. 1976). The doctrine "'comes into play whenever enforcement of the claim requires the resolution of issues [which, under a regulatory scheme, have been placed] within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'" *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 187 (5th

Cir. 1990) (bracketed text in original) (quoting *Southwestern Bell v. P.U.C.*, 735 S.W.2d 663, 670 n.3 (Tex. App. 1987)).

The Supreme Court has long held that "where the claim of unlawfulness of a [telephone company's] regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court." *Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945). Under the Communications Act, the FCC "has the authority not only to determine the reasonableness of rates and practices, but also to grant relief to those victimized by unreasonable rates and practices." *AT&T Corp. v. PAB, Inc.*, 935 F. Supp. 584, 590 (E.D.Pa. 1996). As a result, courts routinely apply the primary jurisdiction doctrine to cases alleging a carrier's practices are "unjust or unreasonable" under section 201(b) of the Communications Act.

For example, in *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 499-500 & n.25 (5th Cir. 1966), the court affirmed the stay of an antitrust case pending referral to the FCC to determine whether a challenged "practice" of the telephone companies was "just and reasonable." More recently, the Sixth Circuit applied the doctrine of primary jurisdiction in a case alleging, as Stevens does here, that a carrier had violated section 201(b) of the Communications Act. *In re Long Distance Telecomm'ns Litigation*, 831 F.2d 627, 631 (6th Cir. 1987). The court explained:

> The district court was clearly correct in concluding that the claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC. Section 201(b) speaks in terms of reasonableness, and the very charge of Count 1 is that the defendants engaged in unreasonable practices. This is a determination that "Congress has placed squarely in the hands of the [FCC]."

Id. (quoting *Consolidated Rail Corp. v. National Ass'n of Recycling Inds., Inc.*, 449 U.S. 609, 612 (1981)).

In short, the "longstanding case law has dictated that issues of reasonableness are to be determined by federal agencies like the FCC." *Digital Comm'ns Network v. AT&T Wireless Services*, 63 F. Supp. 2d 1194, 1199 (C.D. Cal. 1999). Thus, where "Plaintiffs have clearly put the issue of 'reasonableness' on the table before the Court," such as by alleging a claim under section 201(b), it is appropriate to refer the matter to the FCC because "'[t]here is no doubt that a determination of the reasonableness or discriminatory nature of common carrier rules and charges is squarely at the heart of the FCC's mandate.'" *Id.* (quoting *IMR Capital*, 888 F. Supp. at 244). *See also Alves v. Verizon*, 2010 WL 2989988, *4 (D.N.J. July 27, 2010) (referring section 201(b) claim to the FCC, and noting that "[i]ssues involving 'abstract statutory terms such as "reasonable" . . . are particularly well suited for transfer to an administrative agency under the primary jurisdiction doctrine'"); *Demmick v. Cellco Partnership*, 2011 WL 1253733, *6 (D.N.J. March 29, 2011) ("courts have consistently found that reasonableness determinations under § 201(b) lie within the primary jurisdiction of the FCC, because they involve policy considerations within the agency's discretion and particular field of expertise"); *Telstar Res. Group, Inc. v. MCI, Inc.*, 476 F. Supp. 2d 261, 272 (S.D.N.Y. 2007) ("Courts have commonly found that claims alleging 'unreasonable' practices in violation of § 201(b) of the FCA are within the primary jurisdiction of the FCC.").

The Court also should stay Stevens' only other claim – Count 2, alleging "unjust enrichment" – pending referral to the FCC of Stevens' section 201(b) claim. Whether Defendants have been "unjustly" enriched plainly is interrelated with the question that lies at the heart of the FCC's expertise: whether Defendants' alleged charges and practices are "unjust or unreasonable." Proceeding to litigate Stevens' unjust enrichment claim would be inconsistent with the purpose of a primary jurisdiction referral, which is to enlist the FCC's expertise in

determining the reasonableness of a carrier's practices, to "secure '[u]niformity and consistency in the regulation of business entrusted to [the FCC],'" and to "promote 'a uniform and expert administration of the regulatory scheme laid down by the Act.'" *Digital Comm'ns Network*, 63 F. Supp. 2d at 1202 (quoting *AT&T Corp. v. Ameritech Corp.*, 1998 WL 325242 at *2 (N.D. Ill. June 10, 1998)).

Indeed, allowing the case to proceed on Stevens' unjust enrichment claim while the FCC determines whether Defendants' alleged charges or practices are unjust or unreasonable would potentially create an impermissible conflict between federal regulation under section 201(b) and Texas unjust enrichment law. *See, e.g., Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1197 (10th Cir. 2007) (holding that equitable relief was unavailable where "allowing [plaintiff] to recover damages under a theory of unjust enrichment or quantum meruit would frustrate the federal regulatory mechanism" under the Communications Act). As a result, the most appropriate course here is to stay Stevens' unjust enrichment claim. *See In re Long Distance Telecomm'ns Litig.*, 831 F.2d at 634 ("The district court is free to stay proceedings on the common law claims pending determination by the FCC of the reasonableness of the defendants' [challenged practices]."); *Tekstar Comm'ns, Inc. v. Sprint Comm'n Co.*, 2009 WL 2155930, *3 (D. Minn. July 15, 2009) (holding quantum meruit claim in abeyance pending primary jurisdiction referral to FCC, noting "the potential for contradictory rulings"); *Demmick*, 2011 WL 1253733 at *7 (staying plaintiff's state law claims pending referral of section 201(b) claim to the FCC, noting that "Plaintiffs' state law claims are based on the same underlying conduct as their [Communications Act] claims and may be subject to a preemption defense").

Conclusion

For the foregoing reasons, this Court should enter an order dismissing or staying Plaintiff's federal claim under the section 201(b) of the Communications Act on the ground that the FCC has primary jurisdiction over that claim, and staying Plaintiff's unjust enrichment claim.

Dated: November 1, 2011

Respectfully submitted,

/s/ Michael J. Truncale

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CERTIFICATE OF SERVICE

I, Michael J. Truncale, hereby certify that on November 1, 2011, I electronically filed the foregoing Motion to Dismiss or Stay Plaintiff's Claims Pursuant to the Doctrine of Primary Jurisdiction by using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Michael J. Truncale